Exhibit 3

No. 12-40954

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: JEWELL ALLEN, ROSALINDA ARMADILLO, MAVIS BRANCH, FELICIANO CANTU, DAVE GALLOWAY, JOHN GARCIA, JULIAN GARCIA, ROBE GARZA, DIANA LINAN, THELMA MORGAN, JOEL MUMPHORD, JEAN SALONE, JAMES SHACK, and BETTY WHITESIDE

Petitioners

-against-

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,

Respondent

CITGO PETROLEUM CORPORATION, CITGO REFINING AND CHEMICALS COMPANY, L.P., AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

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CERTIFICATE OF INTERESTED PARTIES

The following persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

This case arises out of a criminal environmental prosecution brought by the United States in the United States District Court for the Southern District of Texas styled as *United States v. CITGO Petroleum Corporation, CITGO Refining and Chemicals Company, L.P., and Philip D. Vrazel*, Cr. No. 2:06-cr-00563.

After a trial by jury, the two defendant corporations, CITGO Petroleum Corporation and CITGO Refining and Chemicals Company, L.P., were convicted of Counts 4 and 5 in the indictment for operating two large tanks (approximately 250 feet in diameter and 30 feet tall) as oil-water separators without first installing emission control devices required by the Clean Air Act.[1] Sentencing is scheduled to begin on Monday, September 10, 2012.

The petitioners are Jewell Allen, Rosalinda Armadillo, Mavis Branch, Feliciano Cantu, Dave Galloway, Robe Garza, Julian Garcia, John Garcia, Diana Linan, Thelma Morgan, Joel Mumphord, Jean Salone, James Shack, and Betty

[1] The individual, Philip D. Vrazel, was charged in Count 3 that was severed and then dismissed (Dkt. No. 563). Mr. Vrazel and CITGO Refining and Chemicals Company, L.P. were also charged in Counts 6-10 which were misdemeanor counts tried to the court in a separate proceeding. Mr. Vrazel was found not guilty on all of those counts.

Whiteside (the "community members"). The petitioners lived or worked in the neighborhoods close to the tanks covered by the criminal case. They allege that they have been "harmed" by the defendants' crimes and thus are protected "crime victims" under the Crime Victim's Rights Act, 18 U.S.C. § 3771.

Because this is a mandamus petition, the United States District Court for the Southern District of Texas (Rainey, J.) is a nominal respondent. Fed. R. App. P. 21(b)(4).

STATEMENT OF THE RELIEF SOUGHT

Petitioners respectfully petition this Court, pursuant to the Crime Victim's Rights Act (CVRA), 18 U.S.C. § 3771(d)(3), the All Writs Act, 28 U.S.C. § 1651, and Fed. R. App. P. 21, for a writ of mandamus directing the United States District Court for the Southern District of Texas to accord them their rights as "victims" under the CVRA or, in the alternative, to determine their victim status under the "harm" standard established by the CVRA.

ISSUES PRESENTED

1. Whether the district court committed legal error in concluding that a person seeking the protection of the Crime Victim's Rights Act in an environmental crimes case must prove, through expert testimony, a medically diagnosed injury or adverse health condition in order to establish "victim" status under the Act.

2. Whether being forced to breathe noxious gases or suffer emotional distress is "harm" sufficient to trigger victim status under the CVRA.

3. Whether being exposed to risk of death from cancer is "harm" sufficient to trigger victim status under the CVRA.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The facts surrounding this petition are not disputed and are taken from the district court's orders below, along with testimony produced at the district court's

evidentiary hearing on the crime victim status of the affected community members.

A. CITGO's Conviction and the Pre-Sentence Report

On June 27, 2007, a jury returned a verdict of guilty against CITGO on Counts Four and Five of the superseding indictment. Count Four of the Superseding Indictment alleged that:

> From on or about January, 1994, and continuing to on or about May, 2003 . . . the defendants . . . did knowingly operate a new stationary source, an oil water separator, which may emit a hazardous pollutant, benzene, that is tank 116 at the Citgo East Plant Refinery, without an emission control device; to wit, a fixed or floating roof to prevent the emission of benzene into the environment.

Dkt. No. 287 at 11-12. Count Five was identical to Count Four, except that it charged CITGO with operating tank 117 without a roof.

Adjacent to the CITGO refinery in Corpus Christi, Texas, are residential neighborhoods where persons who, over the course of the more than nine years CITGO illegally operated the tanks, would be harmed from CITGO's criminal chemical air emissions in their neighborhood. After CITGO was convicted, the district court ordered a pre-sentence report. The Government identified approximately 100 persons that it believed qualified as "victims" under the Crime Victims' Rights Act and were therefore entitled to testify at sentencing. CITGO filed a motion to exclude these persons from testifying. Dkt. No. 575. The district court decided to hold an evidentiary hearing to resolve the matter.

B. The Evidentiary Hearing

Beginning on April 29, 2008, the district court took testimony from 16 witnesses presented by the Government as representative victims. Some of those witnesses are petitioners in the current motion, while some of the petitioners (Jewell Allen, Mavis Branch, Feliciano Cantu, Dave Galloway, Robe Garza, Julian Garcia, John Garcia, and James Shack) were not called as witnesses. During the the hearing, significant testimony was produced about the harms suffered by all the community members.

1. Testimony Regarding Noxious Fumes

At the pre-sentencing hearings several community members testified about noxious odors released from the CITGO refinery when CITGO was illegally operating the tanks in question. One of the victim representatives, Rebecca Zamora, testified that she endured "ugly odors" for years. Testimony of Rebecca Zamora, April 28, 2008, Tr. 207:25-208:4, App. E. She further testified:

> Well, I remember a sweet odor, a sweet odor. We couldn't—we didn't know what it was, but we could smell that it was sweet, and then we would get another one that—one that would smell like Band Aid or something like that and then another one that would smell like something was rotten, rotten eggs. By that time, we already had window units, but it didn't make any difference because we could still smell the smells inside the house. Whether you had the windows open or you had them closed, you could still smell them.

Id. at 208:10-19. Petitioner Thelma Morgan testified to a turpentine-like smell. Testimony of Thelma Morgan, April 28, 2008, Tr. 229:13-15, App. E. Petitioner Rosalinda Armadillo testified that the smells were sometimes so strong that she slept with a handkerchief over her face to attempt to block them. Testimony of Rosalinda Armadillo, April 29, 2008, Tr. 68:3-9, App. E. Petitioner Betty Whiteside also testified to bad smells, "Well, it was—it was a joy, you know, living there. The only problem that we had, you know, was smells from the refinery, but that was my mother and father's first time buying a house, and, you know, when older people get old, the don't ever like to move away, you know." Testimony of Betty Whiteside, April 29, 2008, Tr. 101:1-5, App. E. She further stated:

> I always keep masks in my car, because I would go to work in the morning at 6:30, and I would leave at 6:00 because I had to be at work at 6:30, and sometimes I would smell the fumes and I didn't really have insurance at the time because I had to let my insurance go because it got too high and I couldn't afford it. So, what I did, I invested in humidifiers. I put them in the bedroom, the living room, and in the hallway, and I always kept my windows closed because I didn't want to get any, you know, smells from the refinery in the house, so I kept my—in fact, I went as far as nailed my windows down. So even when I had guests that come over there, they wouldn't raise the windows, you know because we had a central air and heating unit, but the humidifiers helped me to be able to stay there because, one time, I did have problems and I went to Dr. Bobby Howard, and he was the one that suggested that since I didn't have insurance to go to a doctor, he suggested that I get the humidifiers

> to, you know, help me breathe because, sometimes, you would have a hard time breathing, but I always kept the masks.

Id., 103.3-104.1.

Petitioner Diana Linan, a teacher at a school in the neighborhoods, described "the gas – like gas smells, sweet gas smell." Testimony of Diana Linan, April 29, 2008, Tr. 177:17, App. F. Smelling the odors caused her to suffer itchy watery eyes, itchy throat, and nosebleeds. *Id.* at 180:12-19. Petitioner Joel Mumphord described a strong gas smell that left a bitter taste in the mouth. Testimony of Joel Mumphord, April 29, 2008, Tr. 223:13, App. F. A gasoline-like smell is consistent with the smell of benzene. *Tox Guide for Benzene,* U.S. Dept. of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry; http://www.atsdr.cdc.gov/toxguides/toxguide-3.pdf?id=39&tid=14.

2. Testimony Regarding Mental Harm

The existing record also contains ample testimony about mental harm suffered by those living near the CITGO refinery. Victim representative Rebecca Zamora testified:

> Well, it was very, very stressful, sir. It was so stressful. It's very hard for me to talk about it because I spent so many years there. I know I'm not supposed to hate or feel this way, but I do, I do. Because of all the damages that they did to my property, to my kids, to my husband. The beginning, when we moved there, that my parents bought that, they were very, very small. That refinery was very small; and, all of a sudden, in our eyes, it grew,

> it grew and it grew, and they took over. They took over, and whatever they did, whatever they were spilling, they always told us, "It never leaves the fence. It never leaves the fence." It was a chain link fence.

Testimony of Rebecca Zamora, April 28, 2008, Tr. 215:3-18, App. E. Petitioner Thelma Morgan testified, "Well, I felt like I was losing it, you know, because you're stretched out . . . . I just stayed emotionally stressed, and stress can be really harmful to you, you know, physically and also mentally . . . ." Testimony of Thelma Morgan, April 28, 2008, Tr. 232:9-12, App. E. Petitioner Rosalinda Armadillo testified to the mental harm she suffered as a result of CITGO's conduct, "Well, constantly, during the nighttime and during the daytime also, we experienced a lot of smells, like I say, especially—well, it's horrible smelling those odors and being in the area for some while because, apparently, we can't do anything about it, you know. So, even if we complain, they won't hear us or anything." Testimony of Rosalinda Armadillo, April 29, 2008, Tr. 66:11-19, App. F.

Similarly, Petitioner Joel Mumphord testified that living near the refinery in the Hillcrest neighborhood was "scary," that his "life was turned upside down," and that "we was always in distress." Testimony of Joel Mumphord, April 29, 2008, Tr. 221:19 and 232:1, App. F.

C. The District Court's Ruling

On April 5, 2011, the district court ruled that the Government had not

provided sufficient medical expert testimony to establish that the community members had suffered personal injury from the defendant's crimes. "Thus, in order for the alleged victims to qualify as 'crime victims' under the CVRA, the Government must establish that these individuals were directly and proximately *injured* by emissions from tank 116 and/or tank 117 during the time period from January 1994 to May 2003." App. A, Dkt. No. 729 at 4 (emphasis added). The court focused on health conditions of the community members, concluding "causes for the complained of symptoms other than chemical exposure amount to a possibility." App. A,[2] Dkt. No. 729. The court held "the Government has not adequately proven that tanks 116 and 117 are the specific cause of the alleged victims' health conditions." *Id.* The court reasoned, "Although tanks 116 and 117 may have caused unpleasant odors, there is no proof showing that the concentration of chemicals in these emissions rose to the level necessary to cause health effects." *Id.*

On April 19, 2011, the United States moved the district court to reconsider its decision (Dkt. No. 733) and on July 27, 2011, the court denied the motion to reconsider (Dkt. No. 737), restating its earlier ruling.

On July 6, 2012, the fourteen petitioners filed a motion in their own right,

[2] Along with this petition, the community members have filed an appendix (cited herein as "App.") with parts of the district court record essential to understanding the petition.

with their own newly-obtained (pro bono) legal counsel seeking to be declared crime victims. Dkt. No. 776, App. B. After CITGO responded (Dkt. No. 779, App. C), the fourteen community members replied (Dkt. No. 778), explaining that they were alerting the district court and CITGO of their position and intention to seek (if necessary) further appellate review of the court's earlier ruling denying them crime victim status. On August 22, 2012, the court denied the community members' motion (Dkt. No. 799, App. D), concluding the victims "should have" filed their motion earlier. The district court did not cite any statute, rule, or court order requiring an earlier filing of the motion.

Petitioners now file this petition, seeking to be recognized as victims under the CVRA.[3]

STANDARD OF REVIEW

A. Fifth Circuit Precedent Generally Imposes a "Clear and Indisputable" Error Standard for CVRA Petitions, Even Though Other Circuits (Properly, in Petitioners' View) Disagree

Because this is a mandamus petition under the CVRA, the standard of review in this Circuit is whether the district court committed clear and indisputable error. *In re: Dean*, 527 F.3d 391 (5th Cir. 2008). Four circuits, however, disagree with this Court's standard of review. To preserve this "circuit split" issue for review,

[3] Because of the short time frames for resolving this petition, on August 24, 2012, the community members notified the Court and parties that they would be filing this petition, citing relevant docket entries to the orders involved.

petitioners assert their position that they are entitled to the same ordinary appellate review that other litigants receive in this Court. The reasons for this belief follow briefly, even though *In re: Dean* is currently controlling law in this Circuit.

The issue whether *In re: Dean* should be overruled is pending before this Court en banc in *In re: Amy Unknown*, No. 09-41238 (argued en banc May 3, 2012). Petitioners adopt the arguments of Amy in that case.

The arguments for overruling *In re: Dean* are straightforward: the CVRA specifically provides, "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Ordinarily, "the issuance of a writ of mandamus lies in large part within the discretion of the court." *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979) (en banc). However, the plain language of the CVRA specifically and clearly overrules conventional mandamus standards by directing that "[t]he court of appeals *shall take up and decide such application forthwith* . . . ." 18 U.S.C. § 3771(d)(3) (emphasis added). As explained by the CVRA's Senate co-sponsor, Dianne Feinstein, the CVRA involves "a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of his rights by a trial court to the court of appeals . . . ." 150 CONG. REC. S4262 (daily ed. April 22, 2004) (statement of Sen. Feinstein) (emphasis added).

Three circuits have published opinions holding the CVRA provides victims with the functional equivalent of conventional appellate review. *See Kenna v. U.S. Dist. Ct. for the Central District of California*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re: W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005); *In re: Stewart*, 552 F.2d 1285, 1288 (11th Cir. 2008). The Third Circuit has reached the same conclusion in an unpublished decision. *In re: Walsh*, 229 Fed. Appx. 58 (3d Cir. 2007).

Another provision in the CVRA provides ordinary appellate review to crime victims. The CVRA directs "[i]n *any* court proceeding" —including appellate court proceedings — "the court shall *ensure* that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1). The congressional requirement that appellate courts "ensure" crime victims are "afforded" their rights is fatally compromised if appellate courts can only examine lower court proceedings for clear and indisputable errors.

The CVRA's two co-sponsors have made clear that victims are entitled to ordinary appellate review. Senator Jon Kyl stated:

> [W]hile mandamus is generally discretionary; this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights. Without the right to seek appellate review and a guarantee that the appellate court will hear *the appeal* and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate

> courts are designed to *remedy errors of lower courts* and this provision *requires them to do so* for victim's rights.

150 CONG. REC. at S10912 (daily ed. April 24, 2004) (statement of Sen. Kyl) (emphases added). A recent letter from Senator Jon Kyl to Attorney General Holder, 157 CONG REC. S3608 (daily ed. June 8, 2011), reiterates the CVRA's "unequivocal legislative history" supporting regular appellate review for victims and explaining Congress' intent "to allow crime victims to take accelerated appeals from district court decisions denying their rights and have their appeals reviewed *under ordinary standards of appellate review*" (emphasis added).

B. A District Court Commits Clear and Indisputable Error When it Applies an Incorrect Legal Standard

Applying ordinary mandamus standards of review, the district court committed clear and indisputable error. As has been explained, "the 'hurdles' limiting use of mandamus, 'however demanding, are not insuperable.'" *In re: Amy Unknown*, 636 F.3d 190, 197-98 (5th Cir. 2011) (*quoting Cheney*, 542 U.S. 367, 381 (2004)), *rehearing en banc granted*, 668 F.3d 776 (5th Cir. 2012). A district court commits clear and indisputable error if it applies incorrect legal standards. In discussing application of traditional mandamus standards, the Third Circuit has explained:

> The "clear and indisputable" test is [to be] applied *after* the statute has been construed by the court entertaining the petition." *Douglas*, 812 F.2d at 832 n. 10 (emphasis added). "'The requirement that a duty be "clearly defined" to warrant issuance of a writ does not rule out

> mandamus actions in situations where the interpretation of the controlling statute is in doubt. . . . As long as the statute, once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie.'" *Id.* (citation omitted) (ellipsis in original).

United States v. Palmer, 871 F.2d 1202, 1209 (3rd Cir. 1989) (emphasis added). This Court has taken the same position as the Third Circuit, albeit in an unpublished decision. *In re: Beazley Ins. Co.*, No. 09-20005, 2009 WL 7361370 (5th Cir. May 4, 2009) (per curiam) ("Even in a mandamus proceeding, we must review *de novo* the district court's interpretation of the law.")

Accordingly, this Court should construe the relevant statutes at issue before concluding whether the District Court clearly and indisputably erred. Specifically, this Court must first interpret the legal requirements to be identified as a victim under the CVRA. It is a clear "abuse of discretion to rely on erroneous conclusions of law." *United States v. Jones*, 664 F.3d 966, 981 (5th Cir. 2011). Because the community members meet the statutory definition of victims under the CVRA, mandamus relief should be granted. *See, e.g., In re: Ford Motor Co.*, 591 F.3d 406, 415 (5th Cir. 2009) (granting mandamus relief where the district court had relied on "an erroneous conclusion of law").[4]

[4] Petitioners focus on the second part of the three-part mandamus standard. The first part requires a showing that the community members have no other adequate way to obtain relief. If the Court believes that they can seek review through a conventional appeal of the erroneous rulings below, then the community members will file such an appeal. The third part requires a showing that the issuance of a writ is appropriate under the circumstances. Because the community members are

C. Petitioners Meet the Standards for Supervisory Mandamus

This Circuit has recognized that it can grant a writ of mandamus without a showing of clear and indisputable error. This doctrine is known as the power to issue "supervisory" writs of mandamus. As the Court explained, "Since [1957] the courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process." *In re: McBryde*, 117 F.3d 208, 223 (5th Cir. 1997).

The district court's ruling in this case is precisely such a threat to the proper functioning of the judicial process. The community members seek to give victim impact statements under a broad statute promising them the "right" to do so. Yet, the district court is preparing to conduct a sentencing hearing without any victims being heard. Such a patent violation of the CVRA's congressional mandate warrants this Court's supervisory intervention.

This Court has repeatedly recognized supervisory mandamus to be appropriate to resolve important unsettled issues of law. *See, e.g., In re: Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir. 1987) (affording mandamus relief without a showing of clear error because, among other things, the legal issue presented was of a recurring nature, and the decision would be far reaching); *In re:*

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being denied congressionally-promised rights to participate in the criminal justice system, the issuance of the writ is especially appropriate.

EEOC, 709 F.2d 392, 394 (5th Cir.1983) (noting mandamus is appropriate if "resolution of an important, undecided issue will forestall future error in trial courts, will eliminate uncertainty, and will add significantly to the efficient administration of justice"); *Constructora Subacuatica Diavaz, S.A. v. M/V Hiryu*, 718 F.2d 690, 692 (5th Cir. 1983) (noting the court's "supervisory jurisdiction permits us to issue mandamus for the review of new, important, and unsettled questions").

The issue of how much evidence of harm the community members must present to be given rights as victims presents a new and important question of law that will recur in other environmental crime prosecutions. Accordingly, this Court should review the district court's legal interpretation of the CVRA *de novo* using its supervisory mandamus power.

D. Whether a Person is a "Crime Victim" is an Issue of Law Reviewed Without Deference to the District Court.

Whether petitioners fit the definition of "crime victim" under the CVRA is a pure legal issue that this Court reviews without deference to the district court. *See, e.g.*, *United States v. Brock-Davis*, 504 F.3d 991, 996, 998-99 (9th Cir. 2007); *United States v. De La Fuente*, 353 F.3d 766, 771 (9th Cir. 2003) (reviewing issue of whether entity was a "crime victim" under restitution statute).

THIS PETITION WAS TIMELY FILED, AS IT WAS FILED BEFORE ANY SENTENCING

The community members seek review of two adverse rulings by the district court: (1) the rulings rejecting the Government's motion to have them recognized as CVRA victims (Dkt. Nos. 729 and 737); and (2) the ruling rejecting Petitioners' own motion to be recognized as CVRA victims (based on the same evidentiary record), handed down on August 22, 2012 (Dkt. No. 799, App. D). Both rulings address whether the community members are protected crime victims under the CVRA. Accordingly, it is only necessary for this Court to find that the community members have timely sought review of *either* of these two rulings in order to consider their claims. In fact, petitioners have properly sought review of *both* rulings.

A person asserting the right to be heard at sentencing must "assert the right to be heard *before or during the proceeding at issue*." 18 U.S.C. § 3771(d)(5)(A) (emphasis added). Appellate review of the denial of that right must be requested no later than 14 days *after* sentencing. 18 U.S.C. § 3771(d)(3), (5) (emphasis added). The community members asserted their rights *before* sentencing (which is currently scheduled to begin September 10). Accordingly, their petition is timely filed with regard to both rulings.

A. Community Members Can Properly Seek Review of the District Court's Ruling Rejecting the Government's Argument that They are Crime Victims.

In the district court, the Government argued that the community members were victims. The Government was entitled to assert rights for the victims, until they obtained their own legal counsel. 18 U.S.C. § 3771(d)(1). The district court rejected the Government's arguments, ruling that the community members are not crime victims and therefore that they cannot exercise rights under the CVRA.

The community members have a right to seek appellate review of that adverse ruling, as specifically provided in 18 U.S.C. § 3771(d)(3). CITGO has acknowledged that the CVRA allows the community members to seek appellate review of issues concerning victim status. CITGO, however, argued that the community members were required to seek mandamus review of the district court's April 5, 2011 decision rejecting the Government's motion to have them recognized as victims within 14 days of that decision. Presumably CITGO will reiterate that argument to this Court.

Curiously, for a litigant relying on a statutory time limit, CITGO never quoted the language of the purported time limit in the court below. The language that CITGO likely relied upon is found in 18 U.S.C. § 3771(d)(5),[5] which provides:

[5] The CVRA language covering assertion of rights in this instance is actually found elsewhere in the statute. 18 U.S.C. § 3771(d)(3) provides CVRA rights "shall be asserted in the district court in which a defendant is being prosecuted. . . .

> (5) Limitation on relief — In no case shall a failure to afford a right under this chapter provide grounds for a new trial. *A victim may make a motion to re-open a plea or sentence* only if—
> (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
> (B) the victim petitions the court of appeals for a writ of mandamus *within 14 days*; and
> (C) in the case of a plea, the accused has not pled to the highest offense charged.
> This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(emphases added). The statute contains a 14-day time limit, but the limit applies only to a motion to "re-open a . . . sentence." Obviously, a motion to re-open a sentence cannot be made until the sentence has been imposed. In the context of this case, the community members' time limit for seeking appellate court review will not begin to run until *after* the Court imposes its sentence. At that point, the community members could allege a failure to afford them their promised right under the CVRA to speak at sentencing, 18 U.S.C. § 3771(a)(4), and seek to have the district court's sentence "re-opened" to afford them their right to speak at sentencing. In other words, the CVRA requires only that Petitioners seek review in this Court within 14 days *after* the district court hands down its sentence.[6]

The district court shall take up and decide any motion asserting a victim's right forthwith." Nothing in that provision creates any time limit for a victim to assert his rights.

[6] On CITGO's theory, not only is the community members' petition untimely, but the Government would also have forfeited its right to pursue appellate relief long ago. This makes no sense, as the Government should not be required to pursue

Rather than wait until after sentencing, the community members are bringing the issue to this Court's attention now so that no delay in sentencing will occur. If the Court rules within 72 hours of the filing of this petition, *see* 18 U.S.C. § 3771(d)(3), then it will hand down its ruling on Friday, September 7, and the district court can conduct the sentencing hearing on September 10, with guidance from this Court.

CITGO has argued that the Government's attempt to have the community members declared victims bars the victims from proceeding on their own. This argument is contrary to the CVRA, which sought to make crime victims "independent participant[s] in the proceedings." 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Indeed, the CVRA's legislative history discusses the provision allowing prosecutors to assert victim's rights, making clear that prosecutors' actions cannot in any way impair those rights:

> [T]he provision [18 U.S.C. § 3771(d)(1)] does not mean that the Government's attorney has the authority to compromise or co-opt a victim's right. Nor does the provision mean that by not asserting a victim's right the Government's attorney has waived that right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. *Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right*.

150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

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piecemeal appeals in a criminal case, but rather should be allowed to bring a single appeal after raising all issues related to sentencing.

For all these reasons, the community members have timely sought review of the denial of the Government's motion to have them recognized as CVRA crime victims.

B. Community Members Can Also Seek Review of the District Court's Denial of Their Own Motion to be Recognized as Crime Victims, as They Have Sought Review Before Sentencing.

In addition to seeking review of the district court's denial of the Government's motion, the petition also seeks review of the district court's recent denial of their own motion to be recognized as victims. The district court rejected the community members' motion to be recognized as victims on August 22, 2012. The community members have sought review within 14 days of the ruling.

CITGO contends the community members did not timely file their motion to be recognized as crime victims. CITGO believes that the community members should have filed their own independent motion to be recognized under the CVRA at the same time as the Government did in 2011.

CITGO's argument ignores the fact that the community members did not have to file *anything* in the district court. Under the CVRA, Petitioners could have waited until after sentencing to seek review of the district court's denial of the Government's motion on their behalf.[7] The community members were under no

[7] Whether the victims should seek mandamus review under 18 U.S.C. § 3771(d)(3) or appellate review under 28 U.S.C. § 1291 – or both – is an unsettled

obligation to present an independent request for relief to the district court. Instead, they could have exercised their rights by lurking in the background until after the sentencing and filing for appellate relief at that time. Rather than sandbag the district court and the parties – and potentially force a resentencing – Petitioners determined the proper and forthright course of action was to assert their position prior to sentencing to promote judicial efficiency and avoid surprise. The CVRA should not be construed to bar such transparency.

CITGO also contends the community members' motion should be viewed as untimely under Federal Rule of *Civil* Procedure 59(e)'s time limits for motions to reconsider. Because this case is a criminal case, CITGO's argument is frivolous. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all *civil* actions and proceedings in the United State district courts . . . ." (emphasis added)). Even applying the civil rules, CITGO has cited the wrong rule. Rule 59(e) governs motions for a new *trial*. *See* Fed. R. Civ. P. 59 (entitled "New Trial; Altering or Amending a Judgment"). The applicable civil rule for a motion to reconsider an *order* is Fed. R. Civ. P. 60. Rule 60 allows for motions to be made for reopening for grounds such as "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(a). CITGO never explains why the community members would not

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issue in this Court at this time. *See In re: Amy Unknown,* 636 F.3d 190, 194-97 (5th Cir. 2011) (Jones, J., concurring) (discussing "jurisdictional conundrum" surrounding CVRA appeals).

qualify under these exceptions. Indeed, CITGO appears blind to the realities attending this case in suggesting that the community members should have jumped into the proceedings below with the same alacrity as a multi-national corporation represented by a bevy of lawyers at major law firms around the country. The community members lack CITGO's vast resources. It is precisely because of the community members' inexperience and indigence that they are now represented pro bono by the Utah Appellate Clinic of the University of Utah College of Law and Texas Legal Services Center.

More importantly, the community members did not simply file a motion for the district court to reconsider its earlier denial of the Government's motion to recognize victims in this case. They filed their own, independent motion to be recognized as victims as they are allowed to do under the CVRA. The CVRA provides: "The crime victim or the crime victim's lawful representative and the attorney for the Government may assert the rights described in [the CVRA]." 18 U.S.C. § 3771(d)(1). In this case, the "crime victim's lawful representative" (specifically, attorneys from the Texas Legal Services Center and the Utah Appellate Clinic) has asserted the community members' own rights to be heard at sentencing. Congress added this language to permit crime victims to present their claims independently through legal counsel. *See* 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("a crime victim may choose to enlist a

private attorney to represent him or her in the criminal case. This provision [18 U.S.C. § 3771(d)(1)] allows that attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights.").

In its pleading below, CITGO spilled a lot of ink suggesting that the community members may have been aware of hearings involving their victim status. Dkt. No. 780 at 2-5, App. C. But nothing in CITGO's recitation of the facts suggests or proves that any of the fourteen community members filing this petition specifically waived their right to proceed on their own.[8] Moreover, nothing in CITGO's response suggests that the victims were ever told by the Government or the district court that they were required to join in the Government's earlier motion at the risk of losing their own rights. Clearly, the community members have not made an "affirmative waiver of th[e] specific right," 150 CONG. REC. S4269, to obtain victim status under the CVRA.

Also noticeably absent from CITGO's pleading is any suggestion that it has been prejudiced by the community members' motion filed in July. The community members did not seek a new evidentiary hearing. They relied on the record before the district court. Moreover, CITGO cannot plausibly claim that it was unable to

[8] Since CITGO appears to believe that the Federal Rules of Civil Procedure are somehow applicable to this criminal case, its failure to effect service of process on the fourteen community members as required by Rule 5 of the Federal Rules of Civil Procedure should serve as an absolute bar to any claim that the community members have forfeited their rights.

effectively respond to the community members' legal arguments. CITGO filed a comprehensive response signed by no less than six distinguished attorneys at major law firms in Houston and Chicago.

The district court denied the community members' motion, asserting that "the community members could have retained counsel, appeared on their own, and sought to offer arguments and evidence independent of the Government . . . ." Dkt. No. 799 at 2, App. D. But the court did not explain how the community members, men and women living in impoverished neighborhoods with limited financial resources unfamiliar with the criminal justice process, would have been able to retain legal counsel at that time. There is no right to appointed counsel under the CVRA.

Additionally, the district court opined that the community members "should have" asserted their rights earlier, when the Government was presenting its motion on their behalf. To the extent that the district court is suggesting that the community members missed an unspecified deadline for asserting their rights, the community members respectfully disagree. The CVRA simply does not impose such a deadline.

The district court's scheduling orders contained no deadline for asserting rights. Nor did the court have the power to graft on to the CVRA time limits not provided by Congress. In the CVRA, Congress specifically provided that "[t]he

rights described in [the CVRA] shall be asserted in the district court in which a defendant is being prosecuted for the crime . . . ." 18 U.S.C. § 3771(d)(3). The only time limit found in the CVRA's plain language for asserting these rights is that the victim must "assert[] the right to be heard *before or during* the proceeding at issue . . . ." 18 U.S.C. § 3771(d)(5)(A) (emphasis added). Here, the community members asserted their right to be heard at sentencing more than two months before the proceeding.

The reason Congress did not set more rigid time limits is easy to understand. Few crime victims are represented by legal counsel. Victims may also be traumatized and uncertain whether they want to assert their rights until late in the process. In such a setting, the kinds of rigid time limits found elsewhere in the rules of criminal procedure are inappropriate. Indeed, according to the rules of criminal procedure, the community members made a timely filing. The rules only require that district court motions be made "at least 7 days before the hearing date, unless a rule or court order sets a different period." Fed. R. Crim. P. 47(c). Here, no rule or court order required an earlier filing by the victims, and they filed more than seven days (i.e., two months) before the sentencing hearing.

Moreover, the community members did not make a tactical decision to "delay" filing or to "rely on the government" (as CITGO argued below).[9] Instead, the community members were able to secure pro bono counsel to help them protect their rights only recently. Upon securing counsel, the community members moved in a timely fashion to inform the Court and the parties of the position that they are taking now. The community members have fully complied with the CVRA requirements to assert their rights.

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

At issue in this case is whether the fourteen community members should be recognized as crime victims and allowed to speak the defendant CITGO's sentencing. The writ should issue because the district court committed clear and indisputable legal error, deviating from the CVRA's definition of "victim." Congress has commanded that any person who has been "harmed" by a federal crime, including an environmental crime, is a victim. The district court added the more demanding requirement that the community members needed to show not merely harm from CITGO's crime, but also that they suffered "health effects"

[9] The community members do not deny that there were "town" meetings about the case and "press" reports about CITGO's conviction. Dkt. No. 780 at 3-4, App. C. But Petitioners strongly dispute any claims CITGO is making about their personal decision-making process, such as the claim that they "delayed" filing a motion or "decided" to rely upon the Government to press their claims. CITGO clearly bears the burden of proof on such claims, and it presented no evidence to support its position.

documented through expert medical testimony. The CVRA simply does not require expert proof of health effects to secure the protections of the CVRA in an environmental prosecution. Accordingly, this Court should find the district court's ruling below was based on an incorrect legal premise and must be overturned.

This Court could issue a writ directing the district court to reconsider the Government's and the community member's CVRA motion. But Petitioners request that this Court go further and direct the district court to recognize that the community members have been harmed. The undisputed facts in the record prove the community members have suffered "harm." CITGO's crimes compelled them to breathe noxious gases, which is plainly harm. They have suffered mental distress from the noxious gases, which again is plainly harm. The Court should, therefore, direct the district court to recognize the community members as victims.

This Court should also direct the district court to recognize the community members as crime victims because they have been exposed to the risk of developing deadly cancers. The record is clear that CITGO compelled the community members to breathe benzene-laden fumes, which creates a risk that the community members may develop cancer in the future. To expose a person to a risk (particularly of death by cancer) is "harm" sufficient to trigger CVRA protections. Petitioners request this Court direct the district court to grant them crime victim status on this ground as well.

A. The CVRA Broadly Protects Those Who Have Been "Harmed" by Federal Crimes.

To understand how the district court erred, it is instructive to examine the purpose and language of the Crime Victim's Rights Act. The CVRA sought to reshape the federal criminal justice system by "making victims independent participants in the criminal justice process." *In re: Kenna*, 435 F.3d at 1013. To that end, the CVRA guarantees crime victims a series of rights, including the right "to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ." 18 U.S.C. § 3771(a)(4).

Congress enacted the CVRA in October 2004 as a "broad and encompassing" statute "which provides enforce[able] rights for victims." 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Congress was concerned that crime victims in the federal system were "treated as non-participants in a critical event in their lives. They were kept in the dark by . . . a court system that simply did not have a place for them." *Id*. To reform the system, Congress gave victims "the simple right to know what is going on, to participate in the process where the information that victims and their families can provide may be material and relevant . . . ." *Id.*

Congress intended the CVRA to dramatically rework federal criminal proceedings. As one circuit has observed, "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian

children – seen but not heard. The CVRA sought to change this by making victims independent participants in the criminal justice process." *Kenna*, 435 F.3d 1011, 1013 (9th Cir. 2006). Accordingly, as remedial legislation, the CVRA "is to be construed broadly so as to achieve the Act's objective." *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006).

Congress extended a right to crime victims to be heard at sentencing. This right was designed to ensure that the judge will have full information about a crime's consequences, as well as giving crime victims the chance to explain to their victimizer the damage the crime has done. *See* 150 CONG. REC. 7302 (Apr. 22, 2004) (statement of Sen. Kyl); Jon Kyl et al., *On the Wings of their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act,* 9 LEWIS & CLARK L. REV. 581, 603-08 (2005). In this case, the community members want to exercise this right to make a brief statement at CITGO's sentencing. Congress has commanded that the right to make such a statement extends to all persons who have been directly and proximately "harmed" by a crime.

The legislative history makes clear that Congress intended for courts to give the CVRA's definition of "crime victim" a generous construction. After reciting the definition-of-victim language at issue here, one of the Act's two co-sponsors explained that it was "an intentionally *broad definition* because all victims of crime

deserve to have their rights protected . . . ." 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). The description of the victim definition as "intentionally broad" was in the course of floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight. *See Kenna*, 435 F.3d 1011, 1015-16 (9th Cir. 2006)(discussing significance of CVRA sponsors' floor statements). The provision at issue here must be construed broadly in favor of the community members.

B. The District Court Applied the Wrong Legal Standard in Determining Whether the Community Members Are "Victims" Under the CVRA.

The CVRA defines a victim as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). Under this "intentionally broad" definition, 150 CONG. REC. S10912, the community members needed to show only that they were directly and proximately "harmed" as a result of CITGO's offense in order to obtain the rights promised by the CVRA. However, the district court held the community members to a much higher standard than Congress intended. Specifically, the district court required the community members to prove they had manifesting "health effects" in the form of medically diagnosed physical injuries to be recognized as victims of CITGO's crimes. The CVRA does not require proof of medically diagnosed adverse health effects to obtain victim status – only "harm." 18 U.S.C. § 3771(e).

Under the CRVA, "the term 'crime victim' means a person directly and proximately *harmed* as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e) (emphasis added). "If the criminal behavior causes a party direct and proximate *harmful effects*, the party is a victim under the CVRA." *In re: Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) (emphasis added).

The Government advanced the straightforward argument that "under applicable federal law [it] is not required to present expert medical testimony to establish causation or harm." Dkt. No. 690 at 4. The district court disregarded this argument and held that proving adverse health effects was a pre-requisite to obtaining victim status under the CVRA:

> In the present case, the Government has not adequately proven that tanks 116 and 117 are the specific cause of the alleged victims' *health conditions*. . . . Although tanks 116 and 117 may have caused unpleasant odors, there is no proof showing that the concentration of chemicals in these emissions rose to the level necessary to cause *health effects*.

App. A, Dkt. No. 729 at 6 (emphases added).

The district court refused to grant the community members victim status because they did not establish ultimate "health conditions" or "health effects" from CITGO's crimes. Nothing in the CVRA limits those who are crime victims to those who go on to suffer provable, adverse health effects, and nothing in the CVRA imposes a sole causation standard on victims. The district court's ruling essentially grafted onto the statute a requirement that does not exist.

Although, the district court quoted from the CVRA's definition of "crime victim" in its opinion, it quickly moved from the requirement of a demonstrated "harm" to a demonstrated "injury." After quoting the CVRA's definition and the indictment in this case, the district court recited the Government's burden in this case as requiring proof the community members had been "injured": "Thus, in order for the alleged victims to qualify as 'crime victims' under the CVRA, the Government must establish that these individuals were directly and proximately *injured* by emissions from tank 116 and/or tank 117 during the time period from January 1994 to May 2003." App. A, Dkt. No. 729 at 4 (emphasis added).

The district court's invented "injury" standard adds a layer of analysis that is nowhere contained in the CVRA. This standard may be appropriate to state court personal injury claims – civil cases in which injured persons are parties with full rights to discovery and recovery. But to read such a demanding requirement into a congressional statute designed to broadly protect the rights of crime victims is improper. *See United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir. 1997) (reviewing the Victim Witness Protection Act and finding a congressional preference for remedial justice, emphasizing victims' rights, that counsels against reading a stringent standard of causation such as might be appropriate in a tort context into the VWPA.).

The district court's opinion is replete with words such as "injury," "health conditions," and "health effects" – even though those phrases appear nowhere in the CVRA – instead of the word "harm." *See, e.g.*, App. A, Dkt. No. 729 at 6. CITGO described the district court's ruling as requiring that the community members have "scientific evidence . . . to establish harm from chemical emissions." App. C, Dkt. No. 780 at 14. The district court's analysis was clear legal error because nothing in the CVRA requires scientific evidence of a health condition to be protected under the Act.

Moreover, as discussed in the next sections of this petition, the community members suffered a multitude of harms: breathing bad odors, inability to sleep, being scared, living in a near constant state of distress, burning itchy watery eyes, nosebleeds, being unable to control their exposure, and risk of developing deadly cancers in the future. The CVRA's plain language leads directly to the conclusion that these kinds of consequences are recognizable "harms." Congress intentionally used the broad term "harm," which is generally defined as "physical *or mental* damage." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2006) (emphasis added). If Congress wanted to limit protection to those who were *physically*

injured (i.e., those who suffered adverse health effects), it could have easily written such a limitation into the statute. It did not do so.[10]

Reading the CVRA in this non-technical way is particularly important given the practical realities of environmental crime prosecutions. Most victims of environmental crimes lack the resources to pay legal counsel to represent them in the criminal prosecution. Many environmental crimes are committed against impoverished and minority communities precisely because they lack the resources to object. *See generally* Executive Order No. 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (Feb. 11, 1994). The community members in this case come from predominantly lower-income and minority areas of Corpus Christi. To require them to produce the testimony of expert witnesses in multiple, technical subject matter areas (i.e., toxicology, epidemiology, environmental monitoring, and medicine) to secure their rights, eviscerates the statutory protections Congress enacted.

Determining "crime victim" status in the context of environmental crimes should not be a full-blown exercise in epidemiology. Instead, the determination should be done in a non-technical fashion, similar to fraud cases where courts have

[10] Nor did Congress impose a sole causation standard on victims. The CVRA requires only that the crime be a direct and proximate cause of harm – not the sole cause. Otherwise joint criminals could always escape responsibility by pointing a finger at other culprits.

readily conferred victim status on every individual defrauded by a defendant without burdening the victims with having to prove their status through expert testimony. *See, e.g.*, Starr, et al., *A New Intersection: Environmental Crimes and Victims' Rights*, 23 NATURAL RES. & ENV'T 41, 43 (2009). In construing crime victim's statutes, courts have used a standard of "commonsense inference." *See, e.g., United States v. Vaknin*, 112 F.3d 579, 590 (1st Cir. 1997). Here, common sense plainly reveals that the community members have been harmed by being forced to breathe unpleasant, noxious gases.

In sum, the district court's construction of the CVRA improperly placed many persons who suffer harm from crimes outside the law's protections. The district court, therefore, clearly and indisputably erred in construing the CVRA.

C. Criminally Forcing Community Members to Breathe Noxious Gases is, as a Matter of Law, a Harm Sufficient to Trigger CVRA Victim Status.

Proof that the district court applied the wrong legal standard comes from its failure to consider a variety of harms alleged by the Government and the victims – harms that the district court failed to consider because they were not "injuries" or "health conditions." Undisputed facts in the record are so clear that this Court should not simply remand the case, but rather should direct the district court to recognize the community members as victims.

In this case, the United States identified as "victims" the community members who were harmed by breathing noxious gases – i.e., air containing chemical emissions from CITGO's knowing illegal use of two massive tanks without proper emissions controls at its Corpus Christi refinery for nearly ten years from January 1994 to May 2003. In support of finding the community members to have been harmed, the United States provided extensive testimony from persons living in the neighborhoods adjacent to the CITGO refinery that they had been forced to breathe noxious air contaminated by CITGO.

Nonetheless, the district court construed the CVRA as requiring the Government to show the community members had medically diagnosed manifesting health injuries in order for them to be recognized as CVRA "victims." However, breathing noxious gases as a result of crime is – in and of itself – a "harm" that triggers victim status under the CVRA, regardless of whatever physical ailments may or may not be medically diagnosed at some undetermined time in the future. No one would voluntarily choose to breathe noxious gases. When CITGO criminally forced the community members to do so, it harmed them – meaning that they were victims of the crime.

The question the district court should have asked in making its crime victim ruling is not whether CITGO's crimes ultimately caused health consequences, but whether CITGO's crimes caused *harm*. Since no rational person would voluntarily

choose to breathe benzene-laden air, CITGO's criminal acts obviously harmed those persons who were exposed to this chemical cocktail.

The district court's ruling contained all the necessary factual predicates for finding that the community members were harmed. The court ruled that the community members had been forced to breathe (as it put it) "unpleasant odors":

> Although tanks 116 and 117 may have caused *unpleasant odors*, there is no proof showing that the concentration of chemicals in these emissions rose to the level necessary to cause *health effects*.

App. A (Dkt. No. 729 at 6) (emphasis added). This finding is based in part on undisputed evidence that on December 18, 1995 the Texas Commission on Environmental Quality (TCEQ) traced an odor event to the area of tanks 116 and 117 when a complaint from the Hillcrest area reported a "strong, pungent odor causing respiratory irritation." Dkt. No. 690 at 6. Similarly, on November 7, 1996 the TCEQ investigated three separate complaints of odors that were also causing health effects. The initial complaint involved a strong odor that was nauseating and making the complainant dizzy. Other complainants reported similar symptoms and said the odor was getting stronger. The assigned TCEQ investigator also experienced dizziness, nausea, and a headache from the odor event that was traced directly to tanks 116 and 117. *Id.* at 6-7.

The district court had clear, undisputed evidence that the "unpleasant" odors caused mental harm to those affected by CITGO's crime. The unpleasantness is

significant in this case. For example, Petitioner Cantu testified, "I would get depressed a lot because I was always wondering, with the extent of the odors and the flares, I would wonder if we were going to wake up the next morning because, sometimes, we would even get the odors inside through our AC unit." Dkt. No. 690 at 15 (*citing* Tr. May 1, 2008, p.121: 1-8).

"In the absence of clearly expressed legislative intention to the contrary, the plain language of the statute is to be recognized as conclusive." *Fiber Sys. Int'l., Inc. v. Roehrs*, 470 F.3d 1150, 1157 (5th Cir. 2006). The district court's inquiry should have ended when it found that the defendant's crimes caused the community members to breathe "unpleasant" noxious gases – thereby causing emotional harm. *See, e.g., Crawford v. Nat'l Lead Co.*, 784 F.Supp. 439, 444 (S.D. Ohio 1989) (emotional distress claim allowed to proceed based on unlawful emission of uranium and other harmful substances).

CITGO conceded that its crimes compelled the community members to breathe benzene-laden fumes. *See* Dkt. No. 780 at 14, App. C. Its response to the community members' position was that "[e]very person in an industrial society is frequently exposed to noxious gases." *Id.*. However, there is a significant difference between accidental exposure and a *crime*. Whatever other indignities may attend a modern society, the community members had a right to live their lives without suffering from *criminal* releases of deadly chemicals. Congress and

state legislatures have allowed some activities that produce noxious gases (such as driving a car to work) while criminalizing others (such as operating the CITGO East Plant Refinery without an emission control device to prevent the release of deadly benzene). When a person breathes noxious gases from cars, he may have been harmed – but not harmed by a crime. Conversely, when the community members breathed noxious gases criminally released by CITGO, they were "directly and proximately harmed as a result of the commission of a federal offense," 18 U.S.C. § 3771(e) – which creates "crime victim" status.

CITGO did not contest that its crimes directly and proximately caused the community members to breathe a chemical concoction of ethyl-benzene, styrene, methyl-butyl ether, and a host of other hazardous chemical compounds. CITGO also did not dispute that no sane person would voluntarily choose to breathe such a concoction – particularly where it would cause respiratory irritation, nausea, and dizziness. Consequently, the community members had a right protected by criminal environmental laws (specifically 42 U.S.C. § 7413(c)(1)) to not have to breathe potentially dangerous fumes. Criminal law recognizes harm when there is an "invasion of any social interest which has been placed under the protection of a criminal sanction (whether by common law or statute) . . . ." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 830 (3d ed. 1982). The community

members here suffered from precisely such an invasion – specifically an invasion of their right not have deadly chemicals released into the air that they breathed.

Forcing the community members to breathe noxious gases also inflicted emotional harm. The community members have suffered – and will continue to suffer – emotional trauma wondering whether they will develop cancer because of the defendant's crimes. The community members had no control over the chemicals CITGO spewed into the air around their homes and their workplaces. This caused them emotional distress – i.e., it *harmed* them.

Conceding that the community members have suffered emotional injury, CITGO nonetheless maintained that this is not enough to create victim status under the CVRA. However, the common understanding of the word "harm" is "physical *or mental* damage." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2006) (emphasis added). CITGO offered no authority for confining "victim" status to those who have been physically harmed, rather than embracing those who have suffered from crimes producing only psychic damage (i.e., attempted murder, assault, stalking, possession of child pornography, mailing threatening communications, etc.). CITGO also claimed that the community members cannot cite "a single opinion in which a court found that emotional harm was sufficient to designate a person a victim under the CVRA." App. C, Dkt. No. 780 at 15 n.3. Such cases are easy to find, including most notably controlling precedent from this

Court. *See, e.g.*, *United States v. Wright*, 639 F.3d 679, 684-85 (5th Cir. 2011) (young girl "Amy" was a "victim" of the defendant's crime of possessing child pornography depicting her, even where she had never met the defendant and did not know he was possessing images depicting her until after conviction – mental trauma enough), *rehearing en banc granted on other grounds*, 668 F.3d 776 (2012); *In re: Amy*, 636 F.3d 190, 199 n.10 (5th Cir. 2011), *rehearing en banc granted on other grounds*, 668 F.3d 776 (2012). CITGO cannot cite a single opinion in which the court found that emotional harm suffered as a result of a defendant's crime was an *in*sufficient basis to designate a person as a victim under the CVRA.[11]

What CITGO argued below is that it is free to commit crimes that harm people, provided that the harm it inflicts does not reach a certain provable threshold, such as suffering from cancer that can be linked solely to the crime through expert medical diagnosis. But Congress did not place any threshold severity requirement into the CVRA. Congress could have written the law to

[11] In the district court, CITGO cited *United States v Guidant LLC*, 708 F.Supp.2d 903, 922 (D. Minn. 2010), as standing for the broad proposition that "experiencing emotional harm as the result of a criminal act is not sufficient to confer victim status under the CVRA." App. C, Dkt. No. 780 at 15. This is a gross misreading of *Guidant*. The narrow point of the district court's decision was that the persons using various medical devices had not been harmed as a result of the crime of making false statements to the FDA – rather they were harmed because of the potentially faulty medical devices. 708 F.Supp.2d at 914-15. In contrast, here the community members have been emotionally harmed as a direct result of CITGO's crime of releasing dangerous chemicals, which they then were forced to breathe.

provide that a crime victim is a person "seriously" or "physically" harmed by a crime. It simply did not write the law that way – choosing instead to require putative victims to demonstrate only direct and proximate harm.

Congress chose not to place a minimum threshold of harm into the CVRA to avoid protracted satellite litigation about the severity of injuries as a pre-requisite to crime victim status. More important, Congress wanted broad protection for those harmed by crimes. The legislative history accompanying the "crime victim" definition explains that it was "an intentionally *broad definition* because *all victims of* crime deserve to have their rights protected . . . ." 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

CITGO's only response to this clear legislative history was to argue that the sponsors of the legislation did not specifically discuss environmental crimes. Dkt. No. 780 at 17, App. C. But, Senators Kyl and Feinstein stated directly that "*all* victims of crime deserve" protection in the CVRA. The community members are precisely the kinds of victims that Congress sought to protect. They deserve a voice when CITGO is sentenced.

D. Criminally Inflicting a Risk that Community Members Will Suffer Future Adverse Health Consequences is, as a Matter of Law, Sufficient "Harm" to Trigger the CVRA.

The district court's erroneous construction of the CVRA is further demonstrated by its failure to consider the risk of future adverse health

consequences or the fear of a risk of future health consequences as sufficient harm to trigger the CVRA. Congress intended for crimes involving risk of harm to be covered by the CVRA, and the undisputed facts in the record demonstrate that CITGO placed the community at risk and at fear of risk. Accordingly, this Court should direct the district court to recognize the community members as CVRA victims on this basis as well.

The district court concluded that the Government had to prove actual medically diagnosed health manifestations to demonstrate that an individual was a "victim" of CITGO's crimes. But any suggestion that the CVRA requires a showing of a diagnosed adverse health effect removes a broad swatch of criminal statutes from the CVRA's coverage. The most important criminal environmental statutes are written in terms involving knowing *endangerment*. *See* 42 U.S.C. § 7413(c)(5)(A) (Clean Air Act); 42 U.S.C. § 6928(e) (RCRA); 33 U.S.C. § 1319(c)(3)(B) (Clean Water Act). Under these statutes, it is enough to show that someone has been endangered. Congress was aware that it would take years, if not decades, for diseases caused by some environmental crimes to manifest; consequently, these crimes consists of endangerment. This is an entirely different standard than the civil tort analysis CITGO convinced the district court to adopt.

In this case, CITGO was convicted of violating the Clean Air Act. Specifically, the jury found CITGO "knowingly operated a new stationary source,

an oil water separator, which may emit a hazardous pollutant, benzene, that is tank 116 at the Citgo East Plant Refinery, without an emission control device; to wit, a fixed or floating roof to prevent the emission of benzene into the environment." Superseding Indictment, Count IV, Dkt. 287. CITGO's crime was releasing a known carcinogen – benzene and other chemicals[12] – into the environment. It is well-documented that benzene exposure can cause devastating health problems running the gamut from eye irritation to cancer depending on the frequency, duration, and amount of exposure – a point conceded by CITGO. *See, e.g., Pocket Guide to Chemical Hazards: Benzene,* National Institute for Occupational Safety and Health (2010), http://www.cdc.gov/niosh/npg/npgd0049.html. It is for this reason that emissions of benzene are heavily regulated. Exposing people to benzene is (to put it mildly) risky.

On the days that CITGO criminally released benzene into the air in violation of the Clean Air Act, it placed the community members at risk. Using commonsense inference, this is enough to confer victim status on anyone who was exposed to these releases. On the days in which CITGO released toxins into the

[12] Tanks 116 and 117 contained a chemical cocktail that included benzene, ethyl-benzene, toluene, 1, 2, 4 tri-methyl-benzene, xylenes (total), styrene, 1, 3 butadiene, methyl-butyl ether, and a host of other hazardous compounds. *See* Government Exhibits SH-36 and SH-37. These chemicals, in particular the BTX compounds (benzene, toluene, ethylbenzene, xylene), 3-butadiene and the chemical mixture would have adverse health effects on persons exposed to them. Government Exhibit SH-33.

air, neighbors experienced bad smells, burning eyes, burning noses, sore throats, burning lungs, dizziness, vomiting, nausea, fatigue, and headaches, all of which are consistent with benzene exposure. An element of the offense is that CITGO knew that it was releasing "hazardous" materials – that is, it was placing people in danger. It makes no sense to deny victim status to those whom CITGO knowingly placed in harm's way.

If the charges in this case do not confer rights on victims, then most environmental crimes will effectively become "victimless" crimes. Indeed, if such an approach is accepted, crime victims' rights will be improperly swept away in many other contexts.

Consider, for example, a prosecution for attempted murder under 18 U.S.C. § 1113. If the defendant intends to kill and shoots a bullet at a person's head, the fact that the bullet whistles past the person's ear rather than striking and killing him would mean that the victim had suffered no "health effect" and therefore had not been harmed. Under CITGO's reasoning, attempted murder is a "victimless" crime because the target faced mere risk of death, rather than being injured or killed. Yet in this attempted murder example, the shooter has obviously placed his target in jeopardy, creating "victim" status.[13] Likewise, CITGO's criminal releases

[13] It makes no difference whether the target was aware that the bullet was fired at him or not. A person is a "victim" of an attempted murder, even if he is sleeping when the bullet is fired and he continues to sleep after the attack. *See* JOSHUA

of dangerous substances have placed the surrounding communities in jeopardy – jeopardy of disease and even death.

Other incongruous results would follow if this Court rejects risk as a basis for proving harm under the CVRA. The federal criminal code defines a "crime of violence" as including any felony offense "that, by its nature, involves a substantial *risk* that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (emphasis added). Many violent crimes under this section would become "victimless" if risk is not a harm, because risk of physical force being used is not the same as an actual physical injury being suffered. Consider the crime of assault within federal jurisdiction. 18 U.S.C. § 113. Assault is committed not only by injuring a person but also by a *threat* to inflict injury upon the person of another which causes a reasonable apprehension of immediate bodily harm. *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976). For instance, waving a knife in someone's face is an assault. *See* WAYNE R. LAFAVE, CRIMINAL LAW 737 (3d ed. 2000) (in contrast to battery, "[a]ssault . . . needs no such physical contact"). Following the district court's reasoning, assault is a victimless crime when it involves a mere "threat" to inflict injury rather than actual physical injury.

DRESSLER, UNDERSTANDING CRIMINAL LAW 122 (4th ed. 2006) (discussing example of sleeping attempted murder victim).

The district court's position equates "harm" under the CVRA with immediate physical injury. This approach constricts the CVRA to offenses that involve direct physical injury – and excludes other serious crimes including attempted murder, drive-by shootings, assault, stalking, possession of child pornography, child endangerment, drunk driving, mailing threatening communications, and a host of crimes where the essence of the offense is placing a person at risk physically, psychologically, or economically. There is simply no basis for concluding that Congress wanted the "harm" necessary to trigger the protections of the CVRA narrowly confined to those producing provable physical injury.

Congress presumably would not have wanted the uninjured target of an attempted murder or drive-by shooting to be denied victim status simply because of the mere fortuity of a criminal's bad aim. At a minimum, the target of an attempted murder or drive-by shooting suffers an invasion of his right to personal security, thereby suffering harm. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 122 (4th ed. 2006) ("'[S]ocial harm' may be defined as the negation, *endangering*, or destruction of an individual, group, or state interest which was deemed socially valuable. Thus, the drunk driver and the attempted murderer of the sleeping party have *endangered* the interests of others . . . .") (emphases added) (internal quotation omitted). A whole host of offenses

commonly covered by the CVRA rest on this chain of reasoning. A victim of assault, for example, who has had a knife waved in his face has not suffered direct physical injury but qualifies for protection under the Act because of the psychic toll and invasion of his sense of security that such a crime entails. Similarly, CITGO's crimes – which extended over years and years – have imposed a psychic toll on the surrounding community that creates a cognizable harm.

Being exposed to a risk is harm to a victim. As one legal scholar has explained, "We have an interest in being safe – in being securely free of the risk of substantive harm; that interest is set back when I am endangered, even if no substantive harm ensues." R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 949 (2005). The fact that the community members and their children must live their lives in the shadow of having been placed in danger creates sufficient harm to obtain the protection of the Crime Victims' Rights Act. In the words of one of the drafters of the CVRA, "Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives." 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Feinstein).

The community members have suffered psychic and emotional harm by being placed in danger by CITGO's crimes. They are also harmed by the need to take responsive remedial measures – which some community members have done. *See, e.g.*, Testimony of Rosalinda Armadillo, Tr. 68:3-9 (sleeping with

handkerchief over her face to protect herself from the fumes); Testimony of Betty Whiteside, Tr. 103.3-104.1 (keeping masks in her car to wear to protect herself from the fumes). The district court believed that "there is no proof showing that the concentration of chemicals in these emissions rose to the level necessary to cause health effects." App. A, Dkt. No. 729 at 6. That is small consolation to the petitioners, who must continue to watch and see if those "health effects" including deadly cancers develop.

Medical records produced by the Government showed the defendants' crimes have forced the community members to undertake medical monitoring to see whether adverse health conditions have developed as a result of their exposure to the benzene released by CITGO. Whether or not CITGO's crimes are solely responsible for their medical treatment, the community members have sought medical help because of symptoms known to be caused by benzene exposure, such as burning watering eyes, nosebleeds, and digestive problems. That the need for medical monitoring creates a compensable harm is well known in the courts. *See, e.g., Klier v. Elf Atochem North America, Inc.,* 658 F.3d 468, 472 (5th Cir. 2011) (discussing class action settlement providing for compensation based on mere "proximity-to-plant and exposure standards" rather than adverse health effects). Because of CITGO's crimes, the community members must remain vigilant for symptoms of benzene exposure.

Courts of Appeals have held that the need to take remedial measures because of a crime is "direct and proximate harm" from that crime. A good illustration comes from *United States v. De La Fuente*, 353 F.3d 766 (9th Cir. 2003), which held that the U.S. Postal Service was a victim of the offense of mailing threats to injure contained in 18 U.S.C. § 876(c). In *De La Fuente*, the defendant mailed a letter containing a harmless white powder, attempting to simulate anthrax. When the letter broke open at a mail processing center, the Postal Service was forced to evacuate the center, losing the work time of its employees. The Ninth Circuit concluded the Postal Service was "directly and proximately harmed" by the crime and that, as a victim of the offense, was eligible for restitution for its employees' lost time.

The loss to the Post Office found to be sufficient harm in *De La Fuente* pales in comparison to the loss that the community members have suffered. The community members must spend the rest of their lives attempting to respond not to a substance that proved to be harmless, but rather to toxic substances such as benzene – substances known to be deadly. *See, e.g.*, 42 U.S.C. § 7412(b) (listing benzene as harmful substance). Hopefully, none of the community members will die from benzene-caused cancers. Even if that is the happy final outcome, they have been harmed by CITGO's crimes.

This case is similar to *In re: Parker* in which W.R. Grace exposed residents of Libby, Montana to asbestos. The district court held the residents lacked the required causal nexus between their harm (increased risk of pulmonary diseases) and W.R. Grace's conduct. *United States v. W. R. Grace,* 597 F. Supp. 2d 1157, 1159 (D. Mont. 2009). However, the Ninth Circuit reversed, holding in a summary order that the increased risk of future disease was enough to confer victim status on the town's residents. *In re: Parker*, 2009 U.S. App. Lexis 10270 (9th Cir. 2009). The fact that the community members proven medical injuries "could" have been caused by something else should not be an obstacle to victim status when a wrongdoer has clearly created a risk of those injuries. This Court should reach the same conclusion as the Ninth Circuit and recognize the community members as victims.

In the district court, CITGO did not deny that it criminally exposed the community members on multiple occasions to a deadly, cancer-causing agents such as benzene. *See, e.g.,* 42 U.S.C. § 7412(b) (listing benzene as harmful substance). Its only response is that there was no absolute proof that someone would ultimately die from the cancer. Dkt. No. 780 at 18-19.

What CITGO cannot deny is that exposing someone to a risk is harming them. All persons "have a legitimate interest in avoiding unwanted risks. A [defendant] who inflicts a risk of harm on another damages that interest, thus

lowering the victim's baseline welfare." Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) (answering "yes" to the question posed in the title). As a result, being exposed to a risk of disease – such as benzene-induced cancer – is clearly a harm:

> If harm is [defined as] a setback to a legitimate interest, it should not be difficult to see why risk of harm is itself a harm, for it is not difficult to make the case that exposure to risk is a setback to a legitimate interest. . . .[I]t is clear from the fact that no normal, nonsuicidal person would choose a higher rather than a lower chance of developing cancer that there is a perfectly commonsensical way in which being exposed to an increased risk of developing cancer is a setback to a person's most fundamental interests.

Id. at 972-73. Numerous cases and other authorities support this proposition. *See, e.g., Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527, 532 (7th Cir. 1983) (finding that the plaintiff's right of action accrues upon exposure to risk). *See generally* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 442 (1990).

Rather than dispute the legal underpinnings of the community members' position, CITGO tried to argue that there is no factual basis for finding that the community members have been placed at risk of developing cancer. However, the district court's findings implicitly show the risk. The district court found: "Although tanks 116 and 117 may have caused unpleasant odors, there is no *proof* showing that the concentration of chemicals in these emissions rose to the level

necessary to cause health effects. Due to these circumstances, the proof of causation before this Court is *inconclusive*." App. A, Dkt. No. 729 at 6 (emphases added). Under the district court's analysis, lack of "proof" means that the risk of health effects is less than 100%; and "inconclusive" causation means that the court could not determine with certainty what is going to happen to the community members. The standard definition of "risk" is "the uncertainty of a result . . . , the chance of injury, damage, or loss." BLACK'S LAW DICTIONARY 1353 (8th ed. 2004). Unless CITGO itself could affirmatively prove that the community members have a 0% chance of developing life-threatening cancers as a result of its crimes, then it has harmed the community members by subjecting them to a risk.

The district court focused on whether the cancers had currently manifested themselves, which might be appropriate in a civil case seeking tort damages. Thus, in connection with the findings just quoted, the district court made clear that it was relying on standards applicable to civil tort actions seeking recovery for manifesting adverse health conditions. The district court explained:

> It is not surprising that in cases of chemical exposure, courts have required one theory of causation to be more likely than other theories of causation. *See Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990); *cf. Castellow v. Chevron USA*, 97 F.Supp.2d 780, 797 (S.D. Tex. 2000). Accordingly, courts have required something more than symptoms and a cause when proving causation in the context of chemical exposure. This is especially true when "working backwards" from symptoms to a cause, like in this case. *See Castellow*, 97 F. Supp. 2d at 797.

App. A, Dkt. No. 729 at 5-6. In citing causation theories, the district court implicitly acknowledged that each plausible theory of causation presents a *risk* of harm. Risk is sufficient to confer victim status, even if it is not sufficient to allow recovery for tort money damages for a health injury. In this case, the issue is not whether the community members are now suffering from cancer but whether CITGO placed them at risk of developing cancer in the future. The district court's finding supports the community members, not CITGO. [14]

Finally, assuming that it could somehow be said that breathing benzene-laden air was completely risk free, CITGO never denied that appellate courts have recognized "victim" status in situations where a defendant's crime necessitated the response to even a harmless substance. *See, e.g., United States v. Quillen*, 335 F.3d 219, 226 (3rd Cir. 2003) (rejecting defendant's argument that "the expense of this expeditious (but in hindsight literally unnecessary) response did not result in an actual loss directly resulting from his conduct"). If responding to a harmless

[14] This conclusion is supported by focusing on the crime of which CITGO was convicted under the Clean Air Act – i.e., failing to operate the tanks with the required emission controls in place. *See* 42 U.S.C. § 7413(c)(1). Unlike other environmental statutes, such as the Clean Water Act, that regulate the concentration of hazardous chemicals allowed in certain discharges, the Clean Air Act regulates how the equipment handling chemicals with potential for harmful air emissions is operated. The Clean Air Act recognizes that reliable measurement of the concentration of harmful chemicals after they are emitted into the ambient air is quite difficult. Therefore, the Clean Air Act creates crimes for failure to properly operate equipment handling the chemicals before the chemicals are emitted into the air. It is the community members' right to be free from criminal handling of that equipment that CITGO violated in this case.

substance creates victim status, surely the community members' need to respond to the release of harmful substances qualifies them as victims. This Court should direct the district court to recognize the community members as victims of CITGO's crimes because CITGO has criminally placed them at risk of developing cancer.

CONCLUSION

For all these reasons, this Court should hold that the district court improperly construed the CVRA in determining whether the community members were victims of CITGO's crimes. This Court should also hold that the community members have demonstrated that they have been harmed by CITGO's crimes. Accordingly, this Court should hold that they are victims, and remand to the district court with directions to ensure that the community members have the right to be heard at sentencing under the CVRA, 18 U.S.C. § 3771(a)(4).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion of Community Members to be Declared Victims Under the Crime Victim Rights Act has been served on counsel of record identified below.

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LENGTH CERTIFICATION

The undersigned certifies that that this Petition complies with the limitations contained in FRAP 21 and FRAP 32(a)(7)(B) because it contains 13,357 words in Times New Roman 14 point font, fewer than the 14,000-word limit for a 30-page document, according to the Microsoft Word software that counsel employs.

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